U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: July 8, 1998

Case No.: **97 INA 543**

In the Matter of:

ELECTRONIC DATA SYSTEMS,
Employer

On behalf of:

SHEBA MIRZA,
Alien

Appearance: S. Z. Brown, Esq., of Dallas, Texas

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ma SHEBA MIRZA ("Alien") by ELECTRONIC DATA SYSTEMS ("Employer") under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at Atlanta, Georgia, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On April 25 1996, the Employer applied by ETA form 750A for alien labor certification for the permanent full time employment of the Alien as a "Financial Analyst" with the following duties set out in Item 13 of Form ETA 750 A:

> Review and analyze economic data to prepare confidential management reports detailing results of business ventures and dealings. Coordinate financial activities between accounts and business units. Provide financial support and determine financial and accounting impacts of business decisions.

AF 187. The position was classified as an Economist under DOT Occupational Code No. 050.067-010.[3] The required Education was a baccalaureate degree in Finance or Economics with no further Training or Experience. The Other Special Requirements were the following:

> Minimum GPA 3.0 and 18 hrs. of Accounting and/or Finance. Require pre-employment drug testing and background investigation including identification and education verification criminal and credit checks.

See Form ETA 750 A, Items 13, 14, 15 at AF 187. After the job was advertised, thirty-four U. S. workers were referred, but none of them was hired for the position. AF 87-163.

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3]050.067-010, **Economist** (profess. & Kin.) alternate titles: economic analyst. Plans, designs, and conducts research to aid in interpretation of economic relationships and in solution of problems arising from production and distribution of goods and services: Studies economic and statistical data in area of specialization, such as finance, labor, or agriculture. Devises methods and procedures for collecting and processing data, utilizing knowledge of available sources of data and various econometric and sampling techniques. Compiles data relating to research area, such as employment, productivity, and wages and hours. Reviews and analyzes economic data in order to prepare reports detailing results of investigation, and to stay abreast of economic changes. Organizes data into report format and arranges for preparation of graphic illustrations of research findings. Formulates recommen-dations, policies, or plans to aid in market interpretation or solution of economic problems, such as recommending changes in methods of agricultural financing, domestic and international monetary policies, or policies that regulate investment and transfer of capital. May supervise and assign work to staff. May testify at regulatory or legislative hearings to present recommendations. May specialize in specific economic area or commodity and be designated Agricultural Economist (profess. & kin.); Commodity-Industry Analyst; (profess. & kin.); Financial Economist (profess. & kin.); Industrial Economist (profess. & kin.); International-Trade Economist (profess. & kin.); Labor Economist (profess. & kin.); Price Economist (profess. & kin.); Tax Economist (profess. & kin.).

Notice of Findings. On April 30, 1997, the CO's Notice of Findings ("NOF") denied the application, subject to the Employer's rebuttal, on grounds that the position was offered subject to requirements that were restrictive, citing 20 CFR § 656.21(b), observing *inter alia* that the requirement of a 3.0 Grade Point Average was not required for the position in the United States or in the DOT job description. The CO added that the Employer had not shown that a worker who graduated college without a 3.0 Grade Point Average would not be capable of performing the Job Duties or that such a hiring criterion was a business necessity. In addition, the CO noted that U. S. workers who appeared qualified for the position and were referred by the State Employment Security Agency ("SESA") were rejected for reasons that were neither lawful nor work related, citing 20 CFR §§ 656.20(c) and 656.21(b). The CO then directed the Employer to file rebuttal evidence that its job requirements were not unduly restrictive and that it had rejected all of the U. S. workers referred for reasons that were lawful and job-related. AF 85-86.

Rebuttal. On June 2, 1997, the Employer's rebuttal addressed the issues noted in the NOF. AF 49-80. The rebuttal consisted of counsel's argument (AF 51-57), statements by Employer justifying the hiring requirements that the CO found to be unduly restrictive (AF 58-59), and the academic record and resume of the Alien (AF 60-61).

Final Determination. In the Final Determination issued June 30, 1997, the CO summarized the NOF and found the Employer's rebuttal insufficient to satisfy the defects noted. The CO said Employer had failed to file the information directed by the NOF in that it did not document the requirement of a 3.0 Grade Point Average and did not include any position descriptions of similar positions that have the same job requirements. Moreover, the reasons Employer asserted in the evidence that it did offer stated its preference, rather than its business necessity for this recruiting standard, which precluded the referral of otherwise qualified U. S. workers. As the Employer failed to document this hiring criterion, the CO concluded that the Employer's job requirements were not normal to this occupation, that it was a preference and not an business necessity, that it was unduly restrictive, and that alien labor certification should be denied. AF 47-48.

Appeal. On August 4, 1997, the Employer filed a motion to reconsider and an appeal. With that motion the Employer offered arguments by counsel and new evidence to add to its rebuttal. The CO did not rule on the motion for reconsideration, but referred this matter to the Board on August 28, 1997, without comment.

Discussion

The Employer's rebuttal and brief clearly indicated that it was aware that the defects noted relative to its unduly restrictive requirement under 20 CFR § 656.21(b) and its rejection of otherwise qualified U. S. workers under 20 CFR §§ 656.20(c) and 656.21(b). The Board cannot determine this appeal, however, as the CO failed to consider and rule on Employer's motion for reconsideration before transmitting the appeal. In **Richard Clarke Associates**, 90 INA 080 (May

13, 1992)(*en banc*), the Board concluded that, "[T]he CO is required to state clearly whether he has denied employer's request for reconsideration ... or has granted the request and, upon reconsideration, affirmed the denial of certification." Failure by the CO to rule on such a motion must result in a remand by the Board. **Charles Serouya & Son, Inc.**, 88 INA 261(Mar. 14, 1989)(*e ban*); **Harry Tancredi**, 88 INA 441(Dec. 1, 1988)(*en banc*).

Accordingly, the following order will enter.

ORDER

The Panel hereby remands the above-captioned matter to Certifying Officer for the limited purpose of determining Employer's motion for reconsideration.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.